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# In the Supreme Court of the United States

OCTOBER TERM, 1967

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No. 1392

GERALD RONALD GUTHRIE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals remanding the case for an evidentiary hearing (Pet. App. A1-A7) is reported at 387 F.2d 569. The *per curiam* opinion (Pet. App. A8-A9) affirming the conviction is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on March 4, 1968. The Chief Justice extended the

time for filing a petition for a writ of certiorari to May 3, 1968, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the indictment charging an offense under the first section of 18 U.S.C. 912, and jury instructions thereon, were fatally defective because they did not specifically raise the issue whether petitioner had impersonated a federal officer "with intent to defraud."

2. Whether, in the circumstances of this case, the trial court committed error by refusing to order a severance.

3. Whether the instructions on the offense charged were plainly erroneous.

4. Whether failure to record closing arguments of counsel, absent any request therefor or showing of prejudice, constitutes plain error.

5. Whether a conversation, found by the courts below to have been unrelated to petitioner's trial, between a government witness and a juror, whom the witness did not know to be such, requires reversal.

6. Whether the trial judge committed plain error in instructing the jury that petitioner did not have to take the stand, but that, if it assumed that he relied upon the defense raised by his co-defendant, that defense would be that he had attempted to impersonate a state, not a federal, bank examiner.

## STATUTE INVOLVED

18 U.S.C. 912 provides:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or office thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

## STATEMENT

Petitioner and one Albert Haden were tried by jury in the United States District Court for the Western District of North Carolina and were convicted of impersonating a federal bank examiner in violation of 18 U.S.C. 912. On April 12, 1967, petitioner was sentenced to three years' imprisonment and a $1,000 fine.[1] The court of appeals rejected all contentions raised on appeal, but remanded the cause, on petitioner's motion, to determine whether petitioner was prejudiced by a conversation between a juror and an F.B.I. agent who appeared as a government witness. 387 F.2d 569 (C.A. 4). After the district court certified that the evidence indicated conclusively that the agent had been unaware that the person to whom he was speaking was a juror and that no aspect of petitioner's case had been discussed (R. 25), the court of appeals accepted this finding and affirmed, *per curiam* (Pet. App. A8-A9).

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[1] Haden was also sentenced to three years' imprisonment (Tr. 230).

The sufficiency of the evidence is unquestioned. On October 12, 1966, co-defendant Haden, purporting to be "Mr. Hunter", a "Federal bank checker" from the Union National Bank of Charlotte, North Carolina, informed a Mr. Stegall that someone was misusing his savings account and outlined a plan whereby the two of them would trap the individual (Tr. 32-42).[2] Stegall expressed his willingness to cooperate, but he called the F.B.I. after Haden departed (Tr. 43, 45). On November 2, 1966, while F.B.I. agents were at Stegall's home in the course of their investigation, Haden telephoned and told Stegall to withdraw $16,000 in savings from the bank (Tr. 44-48). The agents went to the bank and arranged for a dummy package to be made up (Tr. 106-107). Stegall thereafter went to the bank, picked up the package, and returned home. Within minutes, Haden called. After ascertaining that Stegall had obtained the money, he told him that "Mr. Williams" would be out to pick up the money for him (Tr. 49-51). Shortly, petitioner arrived and identified himself as "Mr. Williams", a "Federal bank checker". He exhibited a badge and written credentials and related that "Mr. Hunter" had sent him. As petitioner took possession of the

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[2] We are informed by the Clerk of this Court that the certified record of the district court proceedings has never arrived from the Clerk of the Fourth Circuit Court of Appeals and has presumably been lost in the mails. We are therefore lodging a copy of the transcript of the trial proceedings (Tr.) as well as of the proceedings at the evidentiary hearing upon remand (H. Tr.). The certified record of proceedings in the court of appeals (R.) is already on file with the Clerk of this Court.

dummy package, he was arrested by the agents (Tr. 52-55, 108-113). A search of petitioner's person incident to his arrest revealed a "safety deposit slip" for $16,000 made out to Mr. Stegall and purportedly signed by the bank director (Tr. 116).

The co-defendant, Haden, testified in his own behalf that he had indeed attempted to bilk Stegall, but denied that he had attempted to impersonate a federal bank examiner. He stated that he and petitioner had asserted that they were from a *state* institution (Tr. 139-166). Petitioner did not testify.

## ARGUMENT

1. Petitioner's principal argument here, as in the court of appeals (see Pet. App. A2)—although the theory was never raised in the district court—is that the indictment and the jury instructions were fatally defective in that they failed to set forth in specific language that acting with "intent to defraud" is an essential element of an offense charged under the first clause of 18 U.S.C. 912. His major premise falls, however, for intent to defraud is not something separate and apart from the act of impersonating a federal officer and acting as such. As *United States* v. *Lepowitch*, 318 U.S. 702, 704, indicates, the only facts necessary to establish intent to defraud are that the accused falsely pretends to be a federal officer and thereafter acts as such, thereby causing "the deceived person to follow some course he would not have pursued but for the deceitful conduct." Thus the only operative language necessary to charge the type of

intent subsumed by the statute is the allegation that a defendant "falsely assum[ed] * * * to be an officer * * * of the United States * * * and act[ed] as such." It was with ample justification, therefore, that the 1948 Revisors of the Criminal Code deleted the "with intent to defraud" language as "meaningless" surplusage in light of *Lepowitch*.

Petitioner's reliance upon *Honea* v. *United States*, 344 F.2d 798 (C.A. 5) as establishing a conflict is misplaced. There, the court dealt solely with the second offense set forth in Section 912—that of impersonation of a federal officer and the obtaining of a valuable object as a result. In commenting upon the Revisors' deletion of the words "with intent to defraud" from the statute, the Fifth Circuit stated that with respect to the offense charged under the first portion of the statute, it *agreed* that the words were meaningless when viewed against this Court's decision in *Lepowitch*. (344 F.2d at p. 803). In the instant case, the indictment and the charge to the jury fully and fairly set forth the elements of the offense in terms employing the statutory language. At trial the government established that petitioner had falsely assumed to be a federal bank examiner and that, acting under color of that office, he attempted to obtain unlawfully the funds of another. Nothing more was required under the statute; that conduct was itself fraudulent. The court below, therefore, correctly concluded that petitioner had been properly charged and convicted under the statute.

2. Prior to trial, petitioner's counsel had stated that he did not believe he should represent both de-

fendants, and accordingly separate counsel was appointed for Haden (Tr. 3-5). Petitioner's counsel moved to sever the case on the ground that there would be a considerable amount of evidence admissible against only one defendant (Tr. 10). The United States attorney stated that the two defendants were so closely joined together that it would be not only proper but necessary to try them together (Tr. 11). The court declined to sever the case (Tr. 11).

During the trial the court repeatedly told the jurors, at the appropriate junctures, that testimony with respect to representations made by Haden could be considered only against him (Tr. 37, 38, 40, 43, 47, 50, 51, 67, 70, 72, 73, 76, 79, 81, 87, 89, 90). The evidence against Haden and against petitioner was discrete and readily separable by the jury. The court's further solicitous care that the jury not relate testimony as to Haden's conduct to the question of petitioner's guilt or innocence confirms the conclusion that the exercise of discretion not to sever the defendants was not prejudicial.

In any event, petitioner's argument (Pet. 12) that the jury must have considered against him the testimony about Haden's conversations with Stegall is irrelevant. Although he argues that the "case was tried as a conspiracy without a conspiracy having been alleged," it is well established that, when two persons act in concert, they are co-conspirators, whether or not a conspiracy is formally alleged, and thus the statements made by one in furtherance of the venture may be considered against both. See *United States* v. *Olweiss*, 138 F.2d 798, 799-800 (C.A. 2), certiorari

denied, 321 U.S. 744; *Blue* v. *United States*, 138 F.2d 351, 358 (C.A. 6), certiorari denied, 322 U.S. 736; *Fuentes* v. *United States*, 283 F.2d 537, 539-540 (C.A. 9). Since the independent evidence against petitioner (*supra*, pp. 4-5) clearly justified the conclusion that he was acting in concert with Haden, petitioner received more favorable treatment than was his due when the court repeatedly instructed the jury not to consider against petitioner the conversations between Haden and Stegall.

3. In its final instructions, the trial court read the indictment to the jury (Tr. 197) and thereafter read the entire statute upon which the indictment was founded (Tr. 203-204), inadvertently including in that reading the elements of an offense under the second portion of the statute. The essential elements of the offense with which petitioner was charged—"false impersonation of a federal officer" and "acting as such"—were, however, clearly detailed for the jury. Petitioner cannot complain that the judge went further and described the elements necessary to convict under the second provision of the statute, which actually imposes a more complex burden upon the government, thus making a verdict of guilty less likely. Therefore, the error in instructions, if any, was favorable to petitioner. See *Killian* v. *United States*, 368 U.S. 231, 257-258; cf. *Wood* v. *United States*, 342 F.2d 708, 711-712 (C.A. 8), certiorari denied, 385 U.S. 978; *Michaud* v. *United States*, 350 F.2d 131, 133-134 (C.A. 10).

4. Petitioner asserts that the failure to record the closing arguments of counsel pursuant to 28 U.S.C.

753(b), even in the absence of a request for transcription, automatically compels reversal. Petitioner does not demonstrate, or even suggest, that he was in any way prejudiced by that omission. It is well settled that, absent such a showing, reversal is not required. See, *Edwards* v. *United States*, 374 F.2d 24, 26 (C.A. 10), certiorari denied, 389 U.S. 850; *Stirone* v. *United States*, 341 F.2d 253, 256 (C.A. 3), certiorari denied, 381 U.S. 902; *Burns* v. *United States*, 323 F.2d 269, 270 (C.A. 5), certiorari denied, 376 U.S. 907; *Addison* v. *United States*, 317 F.2d 808, (C.A. 5), certiorari denied, 376 U.S. 905; *Strauss* v. *United States*, 311 F.2d 926, 932-933 (C.A. 5), certiorari denied, 373 U.S. 910.

5. During a recess at trial, F.B.I. Agent Carr spoke with a person who—unknown to him—was a juror in this case. The district court found, after an evidentiary hearing on the matter, that Agent Carr was "wholly unaware" that the person was a juror, that the conversation was a "general one" unrelated to petitioner's case, and that "no harm resulted" to petitioner as a result of that conversation (R. 25). The findings of the district court are amply supported by the evidence (See H. Tr. 4-5, 10, 16, 28).

6. Petitioner also questions a portion of the court's instructions concerning his right not to testify on his own behalf. In order that the instruction may be considered in context, the pertinent portion of the instruction is set forth:

> Now, under a recent decision of the United States Court, the Court of Appeals, when one does not go upon the witness stand and give evi-

dence in his own behalf, then you are not permitted to state the contentions of that individual who is up for trial and does not testify, other than to instruct the jury that he has the right to and does rely upon the presumption of innocence, the fact that he can only be convicted if he is when a jury is satisfied of his guilt and beyond a reasonable doubt, and that he has every inherent right to rely upon his plea of not guilty. But in any event, assuming that he would accept the statements of Mr. Haden, his co-defendant, he says and contends that the badge he had did not indicate that he was a federal employee, he did not falsely assume to be one, and that on the contrary the badge which was offered in evidence as being taken from him on November 2nd by Mr. Carr and the two detectives of the Charlotte police force, that in itself indicates he was a State employee and not an employee of the United States; but, in any event, ladies and gentlemen, you will remember all of the evidence, consider all the evidence, give to these defendants a fair and impartial trial based upon the evidence and the law to the end that if and when your disposition is made it can be said that you did what you thought was right and proper under all the circumstances as may apply to the disposition of a criminal case [Tr. 214-215].

Both earlier in the instructions (Tr. 202) and immediately before the challenged instruction (Tr. 213-214), the trial court advised the jury that it was not to draw any adverse inferences from petitioner's invocation of his constitutional right not to testify. The trial court's additional instruction—to the effect that should the jurors assume that petitioner would adopt

Haden's defense, the defense would be that he had only impersonated a state official—was appropriate in the peculiar circumstances of this case. The only significant factual issue for the jury to resolve was whether petitioner and Haden had impersonated a federal or a state bank examiner. Viewed from this perspective, there is no merit to petitioner's assertion (Pet. 13) that the remarks constituted "impermissible comment by the Court upon the exercise * * * of a right guaranteed to him by the Fifth Amendment * * *."

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1968.

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